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Supreme Court of the United States

OCTOBER TERM, 1948

No. 274

PASADENA RESEARCH LABORATORIES, INC., a corporation,
and RUSSELL R. BAVOUST, an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITIONERS' REPLY BRIEF.

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IN THE
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The petition filed by petitioners herein does not, as set forth in Government's Opposition Brief, page 2, present the question of whether or not "It is necessary for the Government to disprove *every conjectural suggestion as to extraordinary handling* the products might have received from the time they were originally shipped to the time they were examined by government chemical analysts * * *." The first of the five questions presented is whether or not petitioners can be convicted "where there is no evidence to prove that the drugs when tested by the Government expert witnesses were in the same condition as when the drugs were *introduced* into interstate commerce by the accused, and no evidence showing how the drugs were cared for or handled, or the conditions to

which the drugs were subjected between the time they were *introduced* into interstate commerce by the accused and picked up by the Government inspectors?" (Petition for a Writ of Certiorari, pp. 6 and 7.)

The answer to this question when given by this Court will clear up the existing conflicts, and act as an authoritative guidepost in future prosecutions under the Federal Food, Drug and Cosmetic Act of 1938.

The decision of the Court below decides that an accused in a prosecution under the Federal Food, Drug and Cosmetic Act, may be convicted in the absence of such evidence.

This holding is in conflict with the holdings and rationale of *United States v. S. B. Penick & Co., et al.*, 136 F. 2d 413, and *United States v. Buffalo Pharmacal Co.*, 131 F. 2d 500, of the Circuit Court of Appeals for the Second Circuit, as well as the other cases referred to in Petitioners' Brief, pages 9 to 11.

Petitioners are convinced the Court below is in error; but whether right or wrong there is conflict with the Second Circuit, and this Court should decide which Circuit, the Ninth or Second, is right.

The Court below has substituted presumption for proof, and this is most clearly brought out with respect to Count VII, wherein the undisputed, uncontradicted evidence in the case as given by the petitioner Bavouset and the inspector Mrs. Smiley of the corporate petitioner establishes that at the time the vials of Exhibit 1 were shipped they did not contain any precipitate or undissolved material (Petitioners' Brief, p. 18). The Government's evidence as set forth in its Opposition Brief, page 8, is that

on August 1, 1946, Dr. Wiley found a considerable quantity of undissolved material and that in his opinion, the undissolved material was present on June 18, 1946, the date of the shipment by petitioners.

The Court below has raised its presumption contrary to an undisputed fact, and this is in conflict with the well established law that "there can be no presumption contrary to an undisputed fact. The fact negatives the presumption." (See cases in Petitioners' Brief, pp. 33 and 34.)

The indulging in such a presumption by the Court below is in conflict with the decisions of the Circuit Court of Appeals for the Sixth and Eighth Circuits, as set forth in *Heine v. United States*, 135 F. 2d 914, at page 917, a decision of the Circuit Court of Appeals for the Sixth Circuit, and *Ezzard v. United States*, 7 F. 2d 808, at pages 811 and 812, a decision of the Circuit Court of Appeals for the Eighth Circuit.

The Government has clearly set forth its burden on page 11 of its Opposition Brief, as follows:

"* * * the burden on the Government in a criminal case is to prove all the essential elements of an offense beyond a reasonable doubt; * * *."

An element of the Government's case and one of the essential elements necessary to conviction, is proof that the drugs when tested were in the same or substantially the same condition as when they were introduced into interstate commerce by the petitioners.

The herein filed petition asks this Court to decide whether or not in a criminal prosecution of the type herein involved, the Court can supply a lacking essential element

of the offense charged by indulging in the presumption that the goods were properly handled by private individuals between the time they were shipped by petitioners and the time the goods were picked up by the Government inspectors.

In criminal cases it is proper to raise the presumption of regularity of official acts. **However, the presumption of regularity of the acts of private individuals, to our knowledge, has never been applied in a criminal case to overcome the presumption of innocence.**

The cases relied on by the Government on page 12 of its Opposition Brief do not hold that in criminal cases there is a presumption of regularity in the conduct of private individuals. It is only in civil cases that this presumption may be raised. As pointed out in Petitioners' Brief, page 30, there are many presumptions which apply in civil cases which do not apply in criminal cases.

The decision of the Court below is in conflict with the decisions pointed out in Petitioners' Brief, pages 29, 32; and we respectfully submit that this Court should decide the important question of whether in a criminal case under the Federal Food, Drug and Cosmetic Act of 1938 the presumption of regularity of the acts of private individuals should or should not prevail over the presumption of innocence.

The Government, on page 9 of its Opposition Brief, pointed out the difficulty in proving its case should this Court decide that it is incumbent in cases of this nature

for the Government to show that the drugs when tested were in the same condition as they were when shipped. We respectfully submit that difficulty of proof does not excuse the Government from proving *all* elements of the offense charged nor of proving its case beyond a reasonable doubt.

In conclusion we respectfully submit that the petition presents a number of important questions which have not been but which should be decided by this Court, and we sincerely hope that the petition for a writ of certiorari will be granted so that the questions may be decided.

Respectfully submitted,

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Attorneys for Petitioners.

Dated at Los Angeles, California, October 19, 1948.